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WLVI Inc. and International Brotherhood of Electrical Workers, Local 1228, AFL-CIO, Petitioner.

Case 1-UC-837

March 30, 2007

DECISION ON REVIEW AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND **SCHAUMBER**

On June 16, 2006, the Regional Director for Region 1 issued a Decision and Clarification of Bargaining Unit in which she found that the newly created position of video journalist working in the Employer's news department should be included in the bargaining unit of technicians represented by the Petitioner. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's Decision and Clarification of Bargaining Unit. The Petitioner filed an opposition to the request for review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Employer's request for review of the Regional Director's decision is granted solely with respect to the issue of whether the video journalist should be added to the unit pursuant to the Board's decision in The Sun, 329 NLRB 854 (1999).¹

Having carefully considered the entire record with respect to the issue under review, we find that the video journalist should not be added to the bargaining unit because the position is more similar to that of a reporter, whose work is not included in the unit. Under the standard set forth in *The Sun*,² the photography and editing performed by the video journalist is merely incidental to the video journalist's primary role as a reporter.

The Employer operates a television station located in Boston, Massachusetts. It produces a 10 p.m. news program that it broadcasts each night. The Petitioner represents a unit of all 50 technicians and engineers employed at the station. That unit includes 13 news photographers and editors. The collective-bargaining agreement functionally defines the bargaining unit by the type of work performed.³ The collective-bargaining agreement also

Section 1. ASSIGNMENT OF WORK

contains a "non-exclusive jurisdiction" clause that allows the Employer to assign unit work to nonunit employees.

The Employer employs reporters, writers, producers, production assistants and anchors to create and broadcast the 10 p.m. news. There are five reporters, four anchors, two weather anchors, two sports personnel, one sports anchor, and one part-time sports anchor who work on the 10 p.m. news. These employees are not included in the

The Employer created the position of video journalist in 2005, and hired a new employee, Adam Chodak, to fill the position in November of that year. The video journalist is a reporter who shoots and edits his own news stories.

Reporters and the video journalist begin their day by attending a required morning meeting at 9:30 a.m., where possible stories to be covered that day are discussed. Reporters and the video journalist are expected to "enterprise" or pitch news story ideas during this meeting. These ideas are discussed along with other potential news items. Photographers are permitted to come to the morning meeting, but they rarely attend. The morning meeting lasts about a half hour, and at the end of it, the reporters get their assignments for the day.

Photographers receive their daily assignments from an assignment editor. The assignments can include teaming

- (a) The work covered shall be work commonly performed by Technicians such as work in connection with the installation, operation, maintenance and repair of broadcast, television, and audio equipment and apparatus by means of which electricity is applied in the transmission or transference, production or reproduction of voice, sound, or vision with or without ethereal aid, including all types of recordings.
- (b) This also includes all lighting work and studio and field operations work incidental to and necessary to television and audio, video and optical recording work and all still and motion picture photography, film processing, development, editing, splicing and projection work performed for the Employer.
- (c) Work commonly performed by Technicians shall also include the work of building, maintenance, repair, placement, and any operation in connection with television performances of backgrounds, platforms, and other structures forming a part of the scenery or the set picked up by the cameras, and also parallels or platforms used to raise or set cameras upon; lighting devices used to light the television sets and/or performers; properties used on set picked up by the camera, including the handling of all cards and displays used in the studio and on remote pickups; handling lighting on field pickups; procuring properties and performing construction work
- (d) The foregoing describes covered work, which are those functions that are commonly performed by Technicians, and whatever other work is assigned to the Technicians. All assignments shall be made at the sole discretion of the Employer, and the provisions of this Article V shall not be so construed as to restrict the Employer in making assignments of responsibilities, work and/or functions to Technicians or others out of the Bargaining Unit, as the Employer determines to be in its best interests.

¹ We deny the request for review with respect to the Regional Director's finding that the collective-bargaining agreement's nonexclusive jurisdiction clause does not preclude the unit clarification petition.

Chairman Battista and Member Schaumber were not on the Board when The Sun was decided, and do not necessarily agree with the standard enunciated in that case. However, they agree that under The Sun the video journalist should not be included in the unit.

³ The relevant provision of the collective-bargaining agreement is as follows:

up with a reporter, or going out alone to shoot a voiceover (VO) or voiceover sound on tape (VOSOT). A VO on the news is when video is shown with the anchor's voice heard speaking about the video, which was taken by the photographer. A VOSOT is the same as a VO, except the anchor pauses during the narration to let an audio portion of the video clip play, usually a statement from an interviewee. If a photographer is sent out alone to obtain a VOSOT, the photographer asks questions of the interviewee to elicit the filmed statements. When a photographer is assigned to get a VO or VOSOT, the assignment editor usually provides guidance or instructions to the photographer regarding what to shoot, and, in the case of a VOSOT, who to interview and what guestions to ask. The Employer prefers to send an intern or producer with the photographer for these types of assignments, but sometimes photographers are sent out alone.

Reporters are usually teamed with photographers when they are assigned to work on a story. The photographer shoots images for the story, as well as the reporter's stand up in which the reporter talks "to" the camera about the story. After the footage is shot, the reporter returns to the studio, reviews the video, and writes the script for the story. The reporter then handwrites out the time codes to indicate the footage or sound bite clips to be used from the video, and enters this information into the computer. When the script is finished, it is given to the news director, assistant news director, or a producer to review and approve. After the script is approved, the reporter records the voiceover for the story. The completed voiceover and video is then given to an editor. The editor puts the final version of the story together, following the reporter's script, voiceover and footage marks. The completed story, after it is edited into broadcast format, is called a "package." A traditional package is about 90 seconds long.

The video journalist also gets his assignments from the assignment editor. While reporters are sent out with a photographer to get a story, the video journalist goes out alone. The video journalist uses a different type of camera from the one used by the photographers. The video journalist's camera is lighter and less expensive, and shoots digital video. The photographers use a larger, heavier camera that uses beta tape. The special camera technology allows the video journalist to upload his footage into the computer and edit the stories himself. The footage uploads in real time, so while it is uploading, the video journalist watches it and marks footage he would like to use. He then writes the script and, like the reporters, submits the script to the news director, assistant news director, or producer for approval.

Once the script is approved, the video journalist records his voiceovers and uses the computer to edit the footage and voice track into a finished story package. Reporters, on the other hand, write out specific editing instructions for the editor to follow. Some reporters sit with the editor while the piece is being edited, while other reporters simply drop off their script and tapes with an editor. One reporter chooses to edit his stories himself, although he is not required to do so.

The video journalist is expected to develop a package for the news each night, 5 nights a week. Some reporters are expected to do two or three packages a day, but the video journalist is only responsible for one. The video journalist is also sometimes asked to shoot VOs and VOSOTs.

Analysis

In *The Sun*, 329 NLRB 854 (1999), the Board set forth a method for analyzing whether new job classifications should be part of an existing bargaining unit where the unit is defined by the work performed. The Board held:

If the new employees perform job functions similar to those performed by unit employees, as defined in the unit description, we will presume that the new employees should be added to the unit, unless the unit functions they perform are merely incidental to their primary work functions or are otherwise an insignificant part of their work. Once the above standard has been met, the party seeking to exclude the employees has the burden to show that the new group is sufficiently dissimilar from the unit employees so that the existing unit, including the new group, is no longer appropriate.

Id. at 859 (footnote omitted). In determining whether the new group, including the new job classification, is sufficiently dissimilar such that the new group is not an appropriate unit, the Board examines the community of interest between the employees to be added and the existing bargaining unit. Id.

In this case, the bargaining unit is defined by the work performed, and as such, questions of unit clarification are determined under the standard articulated by the Board in *The Sun*. Applying that standard here, we find that the newly created position in this case does not meet the first part of *The Sun* analysis. As set out above, *The Sun* requires that new employees be included in the unit if they perform functions similar to those performed by unit employees, *unless* the unit functions such employees perform are merely incidental to their primary work functions or are otherwise an insignificant part of their work. We find here that the unit work performed by the video journalist is incidental to his primary work func-

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tion, and thus that he should not be added to the bargaining unit of technicians.

As the foregoing facts demonstrate, the video journalist is, first and foremost, a reporter. The video journalist has a journalism degree and a background as a reporter. His primary job responsibility is to research, investigate and write stories for the news. He gathers background information on his stories, identifies people to talk to, arranges to meet with them, and conducts the interviews. In addition, the video journalist is expected to come up with story ideas. Once assigned a story, he "owns" it, and is expected to follow up on any additional developments pertaining to the story that may be newsworthy. Along with the other on-air reporters at the station, the video journalist is required to sign a personal services contract, which includes a provision required by the FCC forbidding the reporter from receiving payment in exchange for on-air promotions.

In contrast, the photographers and editors who are in the unit do not have any of these responsibilities or requirements. Photographers can attend the morning meeting where potential stories are discussed, but they rarely do. Photographers and editors are welcome to come up with story ideas, but so are any of the employees in the news department. Even if a photographer or editor were to come up with a story idea, they would not "own" the story—it would be assigned to a reporter or the video journalist.

While the video journalist does shoot video to accompany his stories, and edits the sound and images into the final story package, this is incidental to his main responsibility of finding, investigating, and writing the news stories. The station created the video journalist position because of new technology that permits a journalist to shoot video without a photographer.⁴ The video journalist uses a digital video camera and a computer-based editing program to prepare his story packages for the evening news. When the traditional reporters go out to cover a story, they are accompanied by photographers who bring a camera, set it up, and record footage. When the video journalist goes out on a story assignment, he brings a video camera with him rather than bringing a photographer. He sets up the camera on location, and records footage and the interviews that he conducts.

That the video journalist uses a camera to augment his reporting duties does not mean that he performs significant unit duties. The Board anticipated such a circumstance in *The Sun*. Identifying a situation in which an

employee's new job function was not consequential, and therefore would not warrant adding the employee to the unit, the Board noted that, "[f]or example, news reporters' use of computers to prepare nearly press-ready copy would be an incidental consequence of the introduction of new technology to the pressroom and would not change their basic work." 329 NLRB at 859 fn. 15. That situation is analogous to the one here. The technology advance discussed in *The Sun* for print reporters allowed the reporters to use a computer to format their stories for publication. Similarly, here a television journalist can use a digital camera to record video to prepare broadcast-ready stories; the use of the camera would appear to be incidental, and not a change in the reporter's basic work.

That this is so is evident by the video journalist's remaining duties. Back at the studio, the video journalist's process is very similar to that of other reporters. He reviews the footage that was shot, marks the clips that he wants to use, and writes the story. Using the computer editing software, he edits the images, sound bites, and his voiceover into a complete, ready-to-air package. Although the video journalist edits his own stories, so do other reporters. The reporters can edit as much and as many of their stories as they want—in fact, one of the reporters chooses to edit his own stories every day. Reporters who chose not to edit their stories make notes regarding what specific footage they want used, and either give the editors detailed instructions regarding how to put the voiceover, sound bites and video together, or they sit in the editing booth with the editor while it was being edited. When the story is given to the editors, the reporters have essentially already edited their pieces by deciding how the images, script and sound bites should go together. The computer software allows the video journalist to bring these pieces together himself rather than telling the editors how to put together what he has envisioned for the story. Similar to the print media example cited to in *The Sun*, the new technology here allows the video journalist to finalize his own story.

When considering the video journalist's job functions as a whole, we find that the video journalist is primarily a reporter, and the photography and editing functions that he performs are only incidental to this primary function. The Petitioner contends that an alternative, dual-function analysis demonstrates that the video journalist must be included in the bargaining unit because of the amount of time that the video journalist spends shooting video or editing his story packages.⁵ In this context, however,

⁴ Pamela Johnson, the news director for WLVI, testified that she and the general manager for the station created the video journalist position because they learned about new technology which allows on-air reporters to shoot and edit their own stories.

⁵ Employees who perform more than one function for the same employer are considered by the Board to be dual-function employees. *Berea Publishing*, 140 NLRB 516 (1963). In determining whether dual-function employees should be included in a bargaining unit, the

parsing the video journalist's day to determine when he may or may not be doing unit work under a dual-function analysis misses the broader picture, which is that the video journalist is fundamentally a reporter. He shoots

Board looks to whether such employees regularly perform work for sufficient periods of time to demonstrate that they have a substantial interest in the unit's wages, hours, and conditions of employment. *Avco Corp.*, 308 NLRB 1045 (1992). Although no bright line rule has been established, the Board generally finds that dual-function employees should be included in a bargaining unit if they spend 25 percent or more of their time performing unit work. Id. at 1047.

The Petitioner contends that the video journalist spends approximately 4 hours, or about half of his regular workday, shooting video and editing his story packages. The Employer contends that these functions take up less than 1-1/2 hours of the video journalist's typical 9-to-10-hour workday. The Regional Director found that the video journalist's job is a combination of reporter and unit work and that those functions are equally important to the broadcast, but they are difficult to separate in terms of time. Under our view of the case, we find it unnecessary to resolve this conflict in testimony.

video while he is gathering information for a story. He reviews the footage of images and interviews, writes a script and edits the pieces together into a narrative that conveys the news story to the audience in a thoughtful and compelling manner. He functions primarily as a reporter who gathers information and puts together stories for the nightly news broadcast. Photography and editing are incidental to this primary function. As such, the video journalist should not be added to the bargaining unit of technicians. Accordingly, we reverse the Regional Director's Decision and Clarification of Bargaining Unit and clarify the unit to exclude the video journalist.

ORDER CLARIFYING UNIT

The collective-bargaining unit is clarified to exclude the video journalist.